SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 330

CHARLES CONLEY LYNCH, JOSEPH CARROLL, and RICHARD BERRY NORTON,

Petitioners,

—v.—

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Opinions Below

The order of the Court of Appeals of Maryland denying certiorari is reported in 236 A. 2d 45 and appears in the Record at p. . The opinion of the Court of Special Appeals of Maryland is reported in 2 Md. App. 546, 236 A. 2d 45, and is set out in the Appendix, *infra*, pp. 1a-21a.

Jurisdiction

The Court of Appeals of Maryland denied certiorari on March 4, 1968. By order dated May 24, 1968, Mr. Chief Justice Warren extended the time within which to file this petition for certiorari to and including July 2, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

Questions Presented

1. Whether the common law charges of "conspiracy to incite a riot", "incitement to riot", and "disorderly conduct", on their face or as applied in this case, violate the First and Fourteenth Amendments to the United States Constitution.

2. Whether the conviction of petitioners is supported by any evidence as required by the due process clause of the Fourteenth Amendment to the United States Constitution.

Statement of the Case

Petitioners, Charles Conley Lynch, Joseph Carroll and Richard Berry Norton, members or officers of the National States Rights Party, were tried in the Criminal Court of Baltimore before a jury, under two indictments. The petitioners were charged in count one of Indictment Number 3700 with inciting a riot, in count two with riot, in count three with using profanity on a public street, in count four with disorderly conduct in a public resort, and in count five with violation of Rule Number One of the Park Rules of Baltimore City (disorderly conduct in the park). The petitioners were charged in count one of Indictment Number 3703 with conspiring to incite a riot, and in count two with conspiring with other persons unknown to riot. The charges in the indictment involved common law crimes except for count five of Indictment Number 3700 which involved a violation of the Park rules.[1]

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[1] The indictments are set out in the Appendix, *infra*, pp. 22a-26a. The State did not press Counts two and three in Indictment Number 3700, or Count two in Indictment Number 3703 (T. 515).

The jury found petitioners guilty of the charges set forth in the first, fourth and fifth counts of Indictment Number 3700 and the charges set forth in the first count of Indictment Number 3703.

Petitioners Lynch and Norton were each given concurrent sentences of two years in the House of Correction and assessed a fine of $1,000 by reason of their conviction under the first count of Indictment Number 3700 and the first count of Indictment Number 3703. In addition, petitioners Lynch and Norton by reason of their conviction under counts four and five of Indictment Number 3700 were each given concurrent sentences of thirty days in the House of Correction, to run concurrently with the other prison sentences, and were fined $50.00 (T. 567-568).[2]

Petitioner Carroll by reason of his conviction under the first counts of Indictment Number 3700 and Indictment Number 3703 was given concurrent sentences of not more than two years in the Maryland Correctional Institution. In addition, petitioner Carroll by reason of his conviction under counts four and five of Indictment Number 3700 was given sentences of thirty days each, to run concurrently with the sentences previously imposed, and a fine of $50.00 that was suspended (T. 568-569).

Petitioners were indicted and tried because of their participation in three outdoor rallies, on the 25th, 27th and 28th of July, 1966. The petitioners had applied for and received a permit on or about July 12 to hold such rallies in Patterson Park in Baltimore City between the hours

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[2] The symbol "T" refers to the pagination of the transcript of the trial which is part of the Record.

of 6:30 P.M. and 9:30 P.M. on each of the three evenings (T. 43).

The Superintendent of Parks testified that the application for a permit was submitted on behalf of a group called "Citizens of Brailsford Committee" and that he was unaware that speakers at the rally were going to be members of the National States Rights Party (T. 37, 38). The petitioners, however, had attended meetings with representatives of the police department on June 22 to discuss the application for a permit to hold such rallies and the manner of conducting such rallies and high ranking officials of the police department were fully aware that such rallies were going to be conducted by members of the National States Rights Party on behalf of the party (T. 77-79). The Superintendent of Parks acknowledged that he had spoken with a police official about the rallies prior to issuing the permit (T. 51, 52).

A rally was held on July 25th in Patterson Park in Baltimore City pursuant to the permit. The rally began at approximately 7 o'clock and continued to approximately 8 o'clock, attracting approximately 200 people (T. 131). The rally of July 25th was described by witnesses for the prosecution as orderly and peaceful notwithstanding the fact that there was some heckling of the speakers by members of the audience (T. 130, 131 and 188).

The petitioners similarly held a rally on July 27th pursuant to the permit, the rally beginning at approximately 7 o'clock and ending at approximately 8 o'clock. The rally attracted between 500 and 600 persons (T. 136) and the police had approximately 150 men present. The rally was similarly orderly and peaceful and the police "didn't have

too much trouble" (T. 111). The only potentially violent incident that occurred involved two white boys and members of petitioner's audience. The police officials were able to separate the two boys from the audience and no one was arrested or injured in connection with the incident (T. 164, 165, 166). The speakers were again heckled and police escorted members of Sparticus and CORE to their cars at the end of the rally (T. 112).

The Superintendent of Parks, by letter of July 28th, revoked the permit. This letter, introduced in evidence, contained several grounds for revoking the permit, including the assertion that there occurred (i) a disturbance of the peace, (ii) the use of unbecoming language and (iii) dangerous conduct (T. 43-45). The Superintendent of Parks had not attended the rallies of July 25 and 26 but revoked the permit on the recommendation of an assistant (T. 49).

Since the permit was revoked, the petitioners did not hold a rally on the evening of July 28th in Patterson Park. The petitioners were advised by high ranking police officials that although the permit had been revoked, the petitioners could hold a rally and speak from their sound truck located on a street adjacent to Patterson Park (T. 155). Accordingly, the petitioners spoke on the evening of July 28th from a sound truck located on a street adjacent to the park and no effort was made by the police to prevent the petitioners from speaking or holding the rally (T. 145).

The rally was described as attracting between 1500 and 3000 persons (T. 135, 219), and the police had approximately 250 men present (T. 178). Most of these people were described as curious and those actually listening to the speakers were estimated at 300 to 400 people (T. 76, 97).

The persons attending the rally were described as "making a considerable amount of noise" (T. 67) and members of the audience chanted "white man fight" (T. 68).

However, the only potentially violent incident occurring during the rally of July 28th involved the chasing of two young Negroes by a group of people in the audience. The group chasing the two Negro boys returned to the rally at the urging of petitioner Carroll and no one was hurt and no one was arrested in connection with the incident (T. 64, 65). Petitioners ended the rally at 8 o'clock upon the Police Commissioner's request to Mr. Carroll (T. 70). At the end of the rally the police again escorted members of CORE and Sparticus from the rally without injury to anyone and one white person who had attended the rally was arrested at this time as a result of an altercation with a policeman (T. 180, 181 and 182). Police also escorted several Negro boys who had been playing basketball in the park from the park without anyone being injured or arrested (T. 186).

Several incidents allegedly involving persons who attended the rally occurred outside the park after the rally had been completed. The only injury reported was a "small cut" suffered by a Negro who was attacked by five white boys (T. 420-422). The five white boys who were said to have attended the rally were arrested. Film of this incident taken by a television cameraman was introduced over objection by petitioners' counsel that the petitioners were not involved in such events. The only other persons reported to have been arrested were two white persons who had been involved several blocks from the park after the completion of the rally in a heated verbal exchange with several Negroes and did not apparently heed the requests

of policemen to leave the area (T. 144) and another white person who became involved in an altercation with a police official several blocks from the rally (T. 502). These white persons arrested were not identified as having attended the rally (T. 150, 502).

The police acknowledged that petitioners were, at all times, cooperative in attempting to maintain law and order (T. 153, 162). The petitioners repeatedly cautioned their audience against resorting to violence (T. 295, 298, 300, 301, 305, 306), stating that if there was any trouble at the rallies the people in the audience should allow "the police to handle it" (T. 300) since the police had "agreed to help maintain order here tonight" (T. 295). On occasions when the audience showed some signs of reacting to hecklers the petitioners calmed the spectators stating that others "deliberately want you to kick the hell out of them to create a disturbance" (T. 306).

The police took tape recordings of speeches made by the three petitioners on each of the three evenings. The tape recordings were introduced in evidence over the objection of petitioners' counsel that the tapes were too garbled to be admissible.

The rallies were advertised in circulars as being "educational sessions" designed to lead to the beginning of a "march to a great white political victory" in 1966 emphasizing that white Marylanders "MUST ORGANIZE" (T. 59). The petitioners set forth the aims and tenets of the National States Rights Party at the rallies as follows:

> "The platform of the National States Rights Party is the belief in God and the Resurrection of Jesus

Christ. They also believe in the constitutional government as laid down in the Constitution and Bill of Rights of the Constitution of these United States of America.

"It spells out plain and clear cut. White supremacy for the white people only—and remember, white men, white women when the Constitution was written, as it was intended by whom it was written, it was written by white people for white people and to white people only" (T. 255-256).

Repeatedly the petitioners reaffirmed their belief "in racial purity, racial segregation" (T. 247) and that this belief was based on the Constitution (T. 256). Petitioners repeatedly reiterated their white supremacist views and gave their views on employment of Negroes (T. 242), integrated education (T. 249), integrated housing (T. 242), welfare (T. 240), gun control laws (T. 266), the Negro movement and its demands (T. 239, 241) and vilified those believed to differ with these views including the President of the United States (T. 178, 240), the Supreme Court (T. 249, 250), the Mayor of Baltimore (T. 178, 269), the F. B. I. (T. 130, 178), and Jewish people (T. 267, 309). Each speaker in turn referred to Negroes as "Niggers" and Negroes were characterized as "wild animals" (T. 272). It was also advocated that all Negroes should be sent to Africa (T. 272, 287).

In order to fulfill the party's objectives, the speakers repeatedly exhorted their listeners to organize as "political organization is the only key to our success as white people" (T. 239). The defeat of open housing laws by the voters in California and other areas was praised (T. 282). The National States Rights Party was described as the "only

white racist party in Maryland to offer constructive political action" (T. 239), and "the only white man's political party in America, bar none" (T. 255). Membership in the States Rights Party was advocated since "if you plan to get into the political arena you have to have a political vehicle to do the job" (T. 259). During the rallies the party informed the audience how to become members and party literature was also distributed (T. 241).

Petitioners emphasized that they were not non-violent. Petitioner Lynch on the evening of July 27th stated that "I believe in violence" and "I believe in fighting by whatever means it takes to defend the constitution to preserve our white race and keep our government in the hands of white people and our children white" (T. 252). Petitioners Norton and Carroll made similar statements about violence. In this connection, petitioner Lynch predicted that some day "black power" and "white power" will meet "in a battlefield and the question will be settled and when the smoke clears away there'll be nothing but white faces left" (T. 262) and that "Niggers are going to be hanged • • • more than ever been hanged before in any country or in any nation in all the world" (T. 263). The petitioners did not, however, urge that members of its audience should resort to violence. Petitioner Lynch stated that his gun was "this mouthpiece of mine" (T. 267) and petitioner Norton requesting that there should not be any violence, stated that "We are not inciting you to riot. The only thing I hope we are inciting you to—is victory" (T. 300-301).

In its charge to the jury, the Court defined the common law crimes of riot as "a disturbance of the peace by three or more assembled persons who carry out a common pur-

pose in such violent and turbulent manner as is calculated to terrify others", and the common law crimes of inciting to riot as willfully "arousing or inducing others to commit a riot" (T. 519). Conspiracy was defined by the Court as "a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose". The Court further instructed the jury that the finding of a conspiracy did not depend upon the "doing of any overt act" by the conspirators or that "the alleged conspirators came together and actually came to terms of a design and pursued it by criminal means" (T. 521). The Court defined the common law crimes of "disorderly conduct" as "the doing or saying or both, of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area. It is conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it" (T. 520). The Court stated prior to describing the legal concepts involved in the indictment that "under the constitution and laws of this state, the jury in the trial of a criminal case is the judge of both the law and the facts" and accordingly "anything the court may say to you about the law is advisory only. It is intended to help you, but you are at liberty to reject the court's advice of the law and arrive at your own independent conclusion on the law if you desire to do so" (T. 516, 517).

The Court commented on the evidence stating that "the three defendants made remarks and delivered speeches derogatory to Negroes and advocating violence" (T. 524). The Court did state prior to commenting on the evidence that "if I should make any comments on the facts, you

are not bound by any such comments in any respect" (T. 517).

On December 6, 1967 the Court of Special Appeals of Maryland affirmed the conviction of petitioners and on March 4, 1968 the Court of Appeals of Maryland denied certiorari.

The constitutional questions presented were raised by petitioners at trial and rejected by the trial court (T. 505-515). The constitutional issues were again raised on appeal to the Court of Special Appeals of Maryland and in the petition for certiorari to the Court of Appeals of Maryland.

REASONS FOR GRANTING THE WRIT

I.

The common law crimes of "conspiracy to incite a riot", "incitement to riot" and "disorderly conduct" as defined by the Maryland Courts violate the First and Fourteenth Amendments.

Although the petitioners were convicted of the common law crimes of "incitement to riot", "conspiracy to incite riot" and "disorderly conduct" solely by reason of speeches that they made on July 25, 26 and 28, neither the trial court nor the Maryland Court of Special Appeals included in the definition of such crimes the requirement that the speeches had either caused a "riot" or a "disturbance of the peace", or gave rise to a "clear and present danger" that a "riot" or "disturbance of the peace" would occur. The common law of Maryland as interpreted by the Maryland Courts thereby permits conviction of persons for

speeches that they have made without requiring a determination that such speeches caused either violence or any other conduct adverse to a substantial interest of the State or created a "clear and present danger" of such conduct occurring. As so interpreted, the common law of Maryland is not in accord with the First and Fourteenth Amendments of the Constitution as interpreted by this Court, which requires that there be a "clear and present danger" that forbidden acts will result from speech before the making of such speech may be punished. *Terminiello* v. *Chicago,* 337 U. S. 1 (1949); *Dennis* v. *United States,* 341 U. S. 494 (1950); *Yates* v. *United States,* 354 U. S. 298 (1957); *Wood* v. *Georgia,* 370 U. S. 375 (1962). The failure by the Maryland Courts to require a determination of a "clear and present danger" is of particular significance where persons are being tried for a common law crime and are not being punished under a "statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State". *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940). See also *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) and *Ashton* v. *Kentucky,* 384 U. S. 195 (1966).

In addition, neither the trial court nor the Maryland Court of Special Appeals precisely defined the scope of such common law crimes. The trial court included within its definition of "incitement to riot" the use of speech that has the effect of "arousing" others to commit violence and defined disorderly conduct in terms substantially identical to the definition that had been held unconstitutional in *Terminiello, supra.* Similarly, the Maryland Court of Special Appeals in affirming the conviction defined the type of speech that may be punished in such a manner that not even the content of such speech may be determinative since:

> "We point out, however, that the ways in which mob violence may be worked up are subtle and various. Rarely will a speaker directly urge a crowd to lay hands on a victim or class of victims. An effective and safer way is to incite mob action while pretending to deplore it" (239 A. 2d at 54; App., *infra* p. 17a).

Furthermore, the trial court instructed the jury that it could disregard even such broad definitions of the crimes and could supply its own definitions (T. 516, 517). Accordingly the jury could have convicted petitioners without finding that they intended to incite violence, or petitioners could have been convicted because the jury strongly disapproved of the content of petitioners' speeches. Consequently, the charges also offend the prohibition in the First Amendment area against vagueness and overbreadth. *Terminiello* v. *Chicago, supra, Cantwell* v. *Connecticut, supra, Edwards* v. *South Carolina, supra, Ashton* v. *Kentucky, supra,* and *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965).[3]

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[3] The crimes here, as interpreted by the Maryland Courts, are to be compared with *People* v. *Epton,* 19 N. Y. 2d 496 (1967), *cert. denied* 390 U. S. 29 (1968), where the trial court charged the jury that a necessary element of the crime of "advocacy of criminal anarchy" and "conspiracy to riot" was a finding that there existed a "clear and present danger" that the defendants' speeches would cause the evil sought to be prevented.

II.

The application of the common law crimes of "conspiracy to incite a riot", "incitement to riot" and "disorderly conduct" to petitioners' speeches violates the First and Fourteenth Amendments.

This Court, long recognizing that "the character of every act depends upon the circumstances in which it is done", *Schenck* v. *United States,* 249 U. S. 47, 52 (1919), has in First Amendment cases consistently examined the nature of the speeches and the circumstances in which the speeches were given in order to determine if punishment for such speeches violated the First Amendment of the Constitution. See e.g. *Edwards* v. *South Carolina, supra,* and *Cox* v. *Louisiana,* 379 U. S. 536 (1965). In addition to the due process requirement that there be some evidence to support a conviction, *Thompson* v. *Louisville,* 362 U. S. 199 (1960), this Court has given especially close scrutiny to the evidence where punishment is imposed under the common law rather than under a narrowly defined statute. *Cantwell* v. *Connecticut, supra, Edwards* v. *South Carolina, supra,* and *Ashton* v. *Kentucky, supra.* Thus certiorari should be granted in this case because there is a substantial question whether the evidence introduced at petitioners' trial was sufficient to establish (i) that petitioners by their speeches intended to incite a riot or disturb the peace, or that their speeches established a conspiracy to incite a riot, or (ii) that petitioners' speeches caused a riot or gave rise to a clear and present danger of riot.

Testimony by witnesses for the State at trial established that petitioners repeatedly urged their audience to co-

operate with the police and not to commit violent acts (T. 295, 298, 300, 301, 305, 306). Other testimony established that petitioners themselves cooperated at all times with the police (T. 153, 162). In such circumstances, there is a substantial question whether the petitioners were convicted for "inciting to riot" and "conspiracy to riot" or were convicted for advocating racist and anti-semitic views. In *Terminiello* which similarly involved a racist and anti-semitic speaker, this Court recognizing the speaker's right to assert his views said:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." 337 U. S. at 4.

Nor can petitioners' speeches be said to have caused a riot or to have created a "clear and present danger" of riot. While this Court has stated that a person may be punished for "inciting to riot", it has also stated that evidence of the existence of "a clear and present danger" of riot is necessary. *Cantwell* v. *Connecticut, supra.* The testimony at the trial indicated that petitioners' rallies attracted several thousand people. Notwithstanding the size of the crowds, only a few incidents were reported and there is doubt whether most of these incidents, which occurred after the rally, could be attributed to petitioners' speeches. Furthermore, there was only one minor injury reported and only nine arrests. Furthermore, there was

no evidence introduced at the trial that any members of groups verbally attacked by petitioners at the rallies committed any acts of violence by reason thereof.

Evidence that members of petitioners' audience were loud and boisterous cannot justify the conviction of petitioners since in *Edwards* this Court stated that "boisterous, loud and flamboyant" behavior of defendants and members of the crowd was not sufficient to justify a finding of guilt of breach of the peace where "there was no violence or threat of violence on [petitioner's part] or on the part of any member of the crowd watching them." 372 U. S. at 236. Similarly, in *Cox,* this Court reversed a conviction for breach of the peace notwithstanding the fact that two thousand angry Negro students were pitted against a crowd of "muttering" and "grumbling" [white] "onlookers", 379 U. S. 543. In addition, in *Cox* the evidence presented at the trial indicated that the defendants had advocated the then illegal acts of sitting at a segregated lunch counter and had advocated resistance of police orders.

The Court below disregarded *Terminiello, Cox,* and *Edwards* and relied instead on *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942) and *Feiner* v. *New York,* 340 U. S. 315 (1951).

Chaplinsky carved out an area of speech embracing "face to face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker." 315 U. S. at 573. Reliance upon this case to punish a political speech to a large audience is misplaced. Similarly the decision of this Court in *Feiner* is distinguishable from this case. Petitioner in *Feiner* specifically urged Negroes to "rise up in arms" and did not caution against violence and disregarded police

requests rather than cooperating with the police. Furthermore, the trial court in *Feiner,* a case tried without a jury, specifically examined the evidence to determine that there was a "clear and present danger" of violence and this Court reexamined the evidence to ascertain if such determination was supported by the evidence. A similar finding was made by the jury in *Epton.* No such determination has been made by the courts below and it is submitted that there is a substantial constitutional question as to whether the evidence in this case would support such a determination.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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